

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
LETTERS PATENT APPEAL NO.175 OF 2002
IN
WRIT PETITION NO.65 OF 1996**

Kusha N. Devadiga
C/o Shri Shridhar Poojari,
204, Rajaram Mohan Roy Road,
Girgaum, Bombay-400 004. Appellant

- Versus -

1. The Mahanagar Telephone
Nigam Limited, through the
Assistant General Manager
(Legal), 9th Floor,
MTNL Telephone House,
Dadar (West),
Bombay-400 028.
2. Bombay Telephones Co-operative
Canteen Society Limited,
through the Honorary Joint
Secretary, Parel Telephone
Exchange Compound, Parel,
Bombay. Respondents

Shri N.M. Ganguli for the Appellant.

Shri S.R. Rajguru for the Respondents.

AND

**LETTERS PATENT APPEAL NO.192 OF 2002
IN
WRIT PETITION NO.65 OF 1996**

The Mahanagar Telephone
Nigam Limited, through the
Assistant General Manager
(Legal), 9th Floor,
MTNL Telephone House,
Dadar (West),
Bombay-400 028. Appellant

- Versus -

1. Kusha N. Devadiga
C/o Shri Shridhar Poojari,
204, Rajaram Mohan Roy Road,
Girgaum, Bombay-400 004.
2. Bombay Telephones Co-operative
Canteen Society Limited,
through the Honorary Joint
Secretary, Parel Telephone
Exchange Compound, Parel,
Bombay. Respondents

Shri S.R. Rajguru for the Appellant.

Shri N.M. Ganguli for the Respondent No.1.

CORAM: R.M.S. KHANDEPARKAR &
S.R. SATHE, JJ.

DATED: APRIL 19, 2006

ORAL JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Since common questions of law and facts arise in both these appeals and both these appeals arise from the same judgment by the learned single Judge, they were heard together and are being disposed of by this common judgment.

2. The appellant/employee Kusha N. Devadiga challenges the impugned judgment so far as it set asides the order of the Industrial Tribunal and denies back wages for the period from the date of the termination of his services till the date of reinstatement whereas the employer-Mahanagar Telephone Nigam Limited challenges the impugned judgment to the extent it directs the management to continue to employ the employee inspite of

confirming the order of termination of the services of the said employee.

3. Few facts relevant for the decision are that the employee was engaged as a casual labour sometimes since January, 1977 in the Cooperage Telephone Exchange canteen run by the Bombay Telephone Co-operative Canteen Society Limited. In September, 1979 the said employee along with five other employees was sought to be transferred from the Cooperage Telephone Exchange canteen to Mandvi Telephone Exchange canteen. The employee, however, refused to accept the said order and also did not report at the transferred place, and on the contrary insisted for continuing to work only at the Cooperage Telephone Exchange canteen. Thereafter, on 18-9-1979 the management issued an order of termination of services of the said employee along with the five other employees who had also refused to report at the transferred place. The dispute came to be referred to the Labour Court in December, 1979 which was dismissed by the Labour Court for want of jurisdiction with the observation that the appropriate Government in the matter was the Central Government. The order in that regard was passed on 17-5-1984. After approaching the Assistant Labour Commissioner (Central) for conciliation proceedings in May, 1985, the matter came to be referred to the Central Industrial Tribunal under Reference

No.2/12 of 1987 pursuant to necessary order in that regard dated 16-12-1986. During the pendency of the proceedings, as the management of the Society was taken over by the Mahanagar Telephone Exchange Limited, consequently the same was joined as the party to the said reference on 22-9-1989. After recording of the evidence, the Industrial Tribunal passed the award on 21-12-1994 whereby the order of termination of the service dated 18-9-1979 came to be set aside and the employee was directed to be reinstated with continuity in service and payment of back wages. The employee initiated proceedings under Section 33-C(2) of the Industrial Disputes Act, 1947 in July, 1995. Meanwhile, the award of the Central Industrial Tribunal was challenged by the employer in Writ Petition No.65 of 1996. By the impugned order dated 14-3-2002, after hearing the parties, the learned single Judge allowed the said petition and while setting aside the order of reinstatement passed by the Industrial Tribunal directed the continuation of the employee in the employment of the management, without payment of back wages. Hence these appeals.

4. The learned Advocate appearing for the management, submitted that the learned single Judge having arrived at the specific finding that the award passed by the Central Government Industrial Tribunal directing

reinstatement of the employee could not be sustained, it was not open for the Writ Court to direct continuation of the employee in service, and that too in the absence of proper recruitment of such employee in the services. On the other hand, the learned Advocate appearing for the employee, submitted that once the learned single Judge had held that neither the chargesheet was issued nor inquiry was held prior to termination of the services of the employee, merely because there was opportunity for the employer to justify the termination of the services before the Labour Court, it could not have interfered with the finding arrived at by the Industrial Tribunal about the illegal termination of services of the employee. Attention was drawn to the decision of the Apex Court in the matter of **M/s. Kundan Sugar Mills v. Ziyauddin and others**, reported in AIR 1960 SC 650 in that regard. According to the learned Advocate for the employee, failure on the part of the employer to issue chargesheet and to hold inquiry before termination of the services was sufficient to hold that the termination was illegal and therefore in the case in hand, the employee having clearly established the fact about the failure on the part of the management to serve the chargesheet and to hold inquiry before issuance of the order of termination dated 18-9-1979, the learned single Judge ought to have held that there was no case for interference in the award passed by the Central

Government Industrial Tribunal. He has submitted that though the learned single Judge has found it proper to direct the continuation of the employee in service from the date of his termination, there was absolutely no justification for refusal of back wages to the employee, particularly in view of the categorical statement of the employee in his testimony that during the period from the date of termination onwards the employee had not been employed elsewhere.

5. The first point for consideration which arises in these appeals is whether in the facts and circumstances of the case, on account of failure on the part of the management to issue chargesheet and to hold inquiry before issuance of the order of termination of services, it would render the order of termination of services to be bad in law. The learned single Judge while dealing with this aspect of the matter had clearly observed that, neither any chargesheet was issued nor any inquiry had preceded before issuance of the order of termination of the services on 18-9-1979, however, mere failure in that regard would not vitiate the order of termination of the services in the facts and circumstances of the case. It has been further held by the learned single Judge that the employer has every right under the law to justify the order by adducing sufficient evidence and material before the Labour Court to justify the order of

termination of services. Obviously, the learned single Judge has arrived at those findings in the peculiar facts and circumstances of the case which is evident from his further observations in the impugned order which read thus:

"The case is straight and simple. The workman was ordered to be transferred from Cooperage Telephone Exchange Canteen to Mandvi Telephone Exchange Canteen. He refused to accept the transfer order and he did not report for work at the transferred place as a result of which the erstwhile employer had terminated his employment by order dated 18.9.1979. Nothing more is required in the given circumstances."

The finding arrived at by the learned single Judge nowhere discloses a general proposition of law to the effect that a punitive order need not be preceded by chargesheet and inquiry. On the contrary, in the peculiar set of facts, the learned single Judge has held that the same clearly warranted and justified the action taken by the employer and further that the employer has made good the deficit of inquiry preceding the order by leading necessary evidence before the Industrial

Tribunal in support of the order of termination, besides that there has been no explanation whatsoever furnished by the employee regarding refusal on his part to comply with the order of transfer and to report at the transferred place, nor has given any justifiable reason for refusal to comply with the said order of transfer. Being so, in the facts and circumstances of the case, the learned single Judge has refused to interfere in the order of termination which is justified in the facts and circumstances of the case while setting aside the order of the Industrial Tribunal which apparently did not disclose application of mind to the facts of the case which warranted termination of the services of the employee.

6. We hasten to observe that it cannot be said that the services of an employee who has been lawfully appointed by following the regular procedure for recruitment can be terminated without following the due process of law. Undoubtedly, the inquiry and opportunity of contesting the charges against such employee would form part of the required procedure to be followed in such matters. Nevertheless, in a given case where the employee engaged as a casual labour, at no stage of the proceedings comes forward with any sort of explanation on his part for non-compliance of the order issued by the management and such an action is the cause for the termination of the

services of such an employee, it may require the matter to be considered in different perspective and on different considerations. We, therefore, do not agree to any proposition that the employer has every right under the law to justify such order by adducing sufficient evidence and material before the Labour Court and that without holding any prior inquiry an order of termination can be passed, yet in the facts and circumstances of this case, where even in these appeals the employee has not been able to put forth any justifiable or sufficient cause for non-compliance of the order of transfer, we hardly see any reason for interference in the order of termination of the services of the employee. It is also to be noted that the records apparently disclose that the employee was appointed as a casual labour. It is well-settled law that the services of a casual labour, in the absence of rules requiring the services of such a labour to be made permanent on completion of service for continuous period of certain number of days and availability of the vacancy for accommodating such an employee on permanent basis, no right is created in favour of such a person for insistence to continue to work contrary to the rules of service and the circumstances where no work is available for his continuation in service.

7. There is a clear finding, as already observed above,

by the learned single Judge that the employee had refused to accept the transfer order or to report at the transferred place. A judicial note can be taken of the fact that the transfer of the employee was at a place hardly at a distance of 3-4 kms. from the place where he was earlier working. He was sought to be transferred from the Cooperage Telephone Exchange canteen to the Mandvi Telephone Exchange canteen which is situated in Mumbai itself, hardly at a distance of 3-4 kms. from the Cooperage Telephone Exchange. Undisputedly, both the Exchanges/canteens are under the management of the same employer.

8. It was sought to be argued on behalf of the employee that the management cannot have right to transfer from one office to another unless there are service rules permitting such transfer even though the place where the employee is sought to be transferred is under the management of the same employer and in that regard attention was drawn to the decision of the Apex Court in **M/s. Kundan Sugar Mills'** case (supra) and more particularly to para 7 thereof. The said para 7 of the decision of the Apex Court reads thus:

"We have referred to the decisions only to distinguish them from the present case, and not to express our opinion as

to the correctness of the decisions therein. It would be enough to point out that in all the said decisions the workers had been employed in a business or a concern and the question that arose was whether in the circumstances of each case the transfer from one branch to another was valid or amounted to victimization. None of these decisions deals with a case similar to that presented in this appeal, namely, whether a person employed in a factory can be transferred to some other independent concern started by the same employer at a stage subsequent to the date of his employment."

9. The decision in M/s. Kundan Sugar Mills' case discloses the law laid down by the Apex Court to the effect that in the absence of, either express or implied conditions of service, the employee would not be entitled to transfer the employee to a new concern started by the employer subsequent to the date of employment of the employee. It is totally different from the proposition sought to be canvassed on behalf of the employee in the case in hand that in no case the employer is entitled to transfer an employee to another

unit of the same employer. It is well-settled law that a law laid down in a decision is to be understood in the facts of the case, the point for consideration which arise therein and the answer given by the judicial pronouncement to such question. The point for consideration before the Apex Court in M/s. Kundan Sugar Mills' case was in relation to entitlement of the employer to transfer an employee to a totally new concern started by the employer, and that too, after the date of employment of the employee. That is not the case before us. As already observed above, the transfer was in another canteen of the same employer. Another canteen to which the employee was sought to be transferred was not started subsequent to the employment of the employee. Another canteen to which the employee was sought to be transferred was not even a new unit started by the employer after the date of employment of the employee. Being so, on no count the decision in M/s. Kundan Sugar Mills' case can be of any help to the employee in the case in hand.

10. It is well-settled law that the transfer is an incident of service. Unless the employee establishes that the order of transfer is mala fide or has been issued by way of punishment to the employee, question of interference in such order does not arise. In the case in hand, undoubtedly, the employee in his written

statement before the Industrial Court had stated that since the employee refused to accept the transfer and insisted that he should not be transferred, as the proposed transfer was mala fide, that with ulterior motive the services of the employee were sought to be terminated by the order dated 18-9-1979. However, undisputedly, apart from bare allegation that the transfer was mala fide and with ulterior motive, neither factual foundation was laid either in the written statement as regards the said allegation nor any evidence was led by the employee to establish the order of transfer to be mala fide or that it was issued with ulterior motive. It is not mere allegation in that regard that would suffice to arrive at the finding about mala fide on the part of the management in the matter of transfer of the employee. It is for the employee who alleges the transfer to be mala fide or with ulterior motive to place on record the necessary facts which could disclose the action to be mala fide or with ulterior motive. In the absence of any effort on the part of the employee to support his allegation, by proper evidence in that regard, the contention in that regard was rightly rejected by the Industrial Tribunal as well as by the learned single Judge.

11. It is then sought to be contended that in any case the punishment by way of termination of services or

refusal to report at the transferred place is disproportionate to the proved misconduct. First of all, it is settled law that unless it is clearly established by necessary materials on record before the Industrial Tribunal that the punishment was indeed grossly disproportionate to the proved misconduct, the Court cannot interfere in the discretion exercised in that regard by the management. Admittedly, this point was not even raised before the Tribunal. That apart, once an employee, without any justification, refuses to report at the transferred place, in our considered opinion, nothing remains for the employer except to put an end to his services, unless the employee comes forward with justifiable reason or sufficient cause for not reporting to the transferred place. Besides, awarding of any other punishment would virtually result in allowing the employee to nullify the effect of the order of transfer. Being so, in the facts and circumstances of the case, we do not find the punishment of termination of services to be disproportionate to the proved misconduct.

12. For the reasons stated above, therefore, we do not find any case having been made out for interference in the impugned order to the extent it set asides the order of the Industrial Tribunal and confirms the order of termination of the services of the employee. However,

the management is justified in contending that the order of termination having been confirmed, there was no justification or even an occasion for the learned single Judge to direct the management to continue the employee in the employment. Once the termination is confirmed, the question of directing the payment of back wages also does not arise.

13. For the reasons stated above, the appeal filed by the employee being Letters Patent Appeal No.175 of 2002 fails and is hereby dismissed. The appeal filed by the management being Letters Patent Appeal No.192 of 2002 succeeds and is hereby allowed. While confirming the order of termination of the services of the employee, the impugned order to the extent it directs continuation of the employee in service is hereby set aside while confirming the order of confirmation of termination of services of the employee and refusal of back wages. Needless to say that since we have held that the employee is not entitled to be in regular employment, the question of payment of back wages on regular pay-scale to the employee or other benefits does not arise. The direction issued by the learned single Judge in that regard in the impugned order therefore will have to be set aside and is accordingly hereby set aside. There shall be no order as to costs.

14. At this stage, the learned Advocate for the employee prays for stay of the order passed in these appeals to enable the employee to have another opinion in the matter. The same is objected to by the Advocate for the respondents. The order passed today is stayed for a period of twelve weeks from today.

(S.R.Sathe, J.)

(R.M.S.Khandeparkar, J.)

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